Filed 5/22/12 P. v. Spivey CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DAVID WAYNE SPIVEY, Defendant and Appellant.	B229312 (Los Angeles County Super. Ct. No. YA064306)

APPEAL from a judgment of the Superior Court of Los Angeles County, Scott T. Millington, Judge. Affirmed as modified.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle and Russell A. Lehman, Deputy Attorneys General, for Plaintiff and Respondent.

David Wayne Spivey appeals from the judgment entered following his conviction by a jury of first degree murder, shooting at an inhabited dwelling and conspiracy to commit murder with true findings on related firearm-use and criminal-street-gang enhancement allegations. Spivey contends the trial court, which sentenced him to an aggregate state prison term of 58 years to life, erred in failing to stay the sentence for shooting at an inhabited dwelling under Penal Code section 654,[1] and constitutional principles prohibit additional punishment for the firearm-use enhancement in this case. We affirm as modified.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Information*

Spivey was charged in a fifth amended information with the willful, deliberate and premeditated murder of Lasha Crooks (§ 187, subd. (a), count 1), attempted willful, deliberate and premeditated murder of Deshay King (§§ 187, subd. (a), 664, count 2), shooting at an inhabited dwelling (§ 246, count 3) and conspiracy to commit murder (§ 182, subd. (a)(1), count 4). As to counts 1 and 2, it was specially alleged Spivey or a principal had personally used and intentionally discharged a firearm causing great bodily injury or death (§ 12022.53, subds. (d) & (e)(1)); and as to counts 3 and 4, it was specially alleged Spivey had personally inflicted great bodily injury in committing the offenses (§ 12022.7). As to all counts it was specially alleged the offense had been committed to benefit a criminal street gang (§ 186.22, subd. (b)(1)).[2]

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1 Statutory references are to the Penal Code unless otherwise indicated.

2 For simplicity on occasion this opinion uses the shorthand phrase "to benefit a criminal street gang" to refer to crimes that, in the statutory language, are committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1); see *People v. Jones* (2009) 47 Cal.4th 566, 571, fn. 2.)

2. *The Shootings*

The Legend Crips and Raymond Crips criminal street gangs were engaged in a violent conflict in March 2006, frequently venturing into each other's territory to shoot rival gang members. On the night of March 5, 2006 Crooks, a Legend Crips member, was shot and killed on a walkway adjacent to the Hollywood Park Motel, a known gathering spot for Legend Crips gang members. The gunfire also penetrated one of the motel rooms then occupied by King, Crooks's boyfriend and fellow Legend Crips member; King was seriously injured.

Responding Inglewood police officers stopped a car they saw driving away from the motel. The four occupants of the car, including Spivey, who was in the backseat, were all Raymond Crips gang members. The police recovered a loaded .40-caliber Smith and Wesson semiautomatic handgun from the front passenger floorboard of the car and another loaded handgun from the driver's floorboard. A third handgun was retrieved from the roof of a nearby garage. Spivey's hands tested positive for gunshot residue primer, indicating a strong likelihood he had either fired or been recently exposed to gun firing. The other backseat passenger's hands also tested positive for gunshot residue primer. Forensic analysis determined expended bullet casings recovered at the motel, as well as the bullet taken from Crooks's body during her autopsy, were fired from the recovered Smith and Wesson handgun.

After being advised of his right to remain silent, to the presence of an attorney and, if indigent, to appointed counsel (*Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694]), Spivey told police he and several others had been ordered by an older Raymond Crips gang member to go to Legend Crips territory and retaliate for prior violent acts against the gang. Spivey, who was 17 years old at the time of the shooting, claimed he did not want to participate but was afraid of the more senior gang member. After driving around in search of Legend Crips members, they went to the Hollywood Park Motel where Spivey got out of the car. Spivey saw two girls outside the motel. Spivey did not want to shoot the girls, but the senior gang member told him, "You better get your ass in there and do this shit." Spivey closed his eyes, pointed his gun up in the

air and fired several shots. After Spivey fired the gun, he threw it into the front seat of the car and then fled with his companions.[3] Spivey said he had no intention of killing anyone and claimed Crooks was a friend of his.

3. *The Conviction and Sentence*

The jury convicted Spivey of the first degree murder of Crooks, shooting at an inhabited dwelling and conspiracy to commit murder and found true the special allegations the offenses had been committed to benefit a criminal street gang and a principal had personally used a firearm during the offenses. The jury acquitted Spivey of the attempted murder of King.

Spivey was sentenced to an aggregate state prison term of 58 years to life: 25 years to life for first degree murder, plus 25 years to life for the firearm-use enhancement under section 12022.53, subds. (d) and (e)(1), plus three years for shooting at an inhabited dwelling and an additional five years for the gang enhancement on that offense under section 186.22, subdivision (b). The court stayed the sentence for conspiracy to commit murder pursuant to section 654.

DISCUSSION

1. *Spivey Was Not Sentenced in Violation of Section 654*

Spivey contends the trial court improperly imposed a three-year consecutive sentence for shooting at an inhabited dwelling in addition to his indeterminate life sentence for first degree murder. Spivey argues these two offenses, as well as the conspiracy to commit murder, all arose from a series of closely related acts constituting an indivisible course of conduct. Accordingly, multiple punishment is barred under section 654.[4] (See *People v. Lewis* (2008) 43 Cal.4th 415, 419 [§ 654 prohibits

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3 A videotape of Spivey's interview was played for the jury, and the jurors were each given a transcript.

4 Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or

punishment for two offenses arising from the same act or from a series of acts constituting an indivisible course of conduct]; *People v. Latimer* (1993) 5 Cal.4th 1203, 1216; see also *Neal v. State of California* (1960) 55 Cal.2d 11, 19 ["Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one."].)

The limitations of section 654, however, do not apply to crimes of violence against multiple victims. (*People v. Oates* (2004) 32 Cal.4th 1048, 1063; *People v. Felix* (2009) 172 Cal.App.4th 1618, 1630-1631.) This exception is justified because "'[t]he purpose of the protection against multiple punishment is to insure that the defendant's punishment will be commensurate with his criminal liability. A defendant who commits an act of violence with the intent to harm more than one person by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person.'" (*Oates*, at p. 1063.) Whether a particular crime is subject to this multiple victim exception depends upon whether the crime ""'is defined to proscribe an act of violence against the person.'"" (*People v. Martin* (2005) 133 Cal.App.4th 776, 782; see generally *People v. Hall* (2000) 83 Cal.App.4th 1084, 1088-1090 [discussing case law under multiple-victim exception].)

Here, separate punishments were imposed for murder as to which Crooks was the victim, and shooting at an inhabited dwelling, as to which King was the victim. There can be no serious question that this latter offer was a crime of violence directed against one or more persons. (See *People v. Martin, supra*, 133 Cal.App.4th at pp. 782-783; *People v. Anderson* (1990) 221 Cal.App.3d 331, 338.) In *Anderson* the defendant was convicted of robbing victim one, shooting at an inhabited dwelling, and assaulting victims two and three. The appellate court concluded punishments were permissible for all four offenses because the inhabited dwelling included not only victims one, two and

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omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

three, but also a fourth person who was inside at the time of the shooting. (*Id.* at pp. 338-339.) As long as each violent offense involves at least one different victim, multiple punishment is not precluded. (*Id.* at p. 339; see also *People v. Cruz* (1995) 38 Cal.App.4th 427, 434-435 [multiple punishment permissible for assault with a firearm and discharging a firearm at an occupied building where defendant fired several shots at a security guard through a glass door, missing other people who were standing near him and were additional victims of the crime].)

In *People v. Felix, supra,* 172 Cal.App.4th 1618 the defendant was convicted of attempted murder and shooting at an inhabited dwelling. (*Id.* at p. 1630.) Our colleagues in Division Eight of this court concluded the uninjured houseguests at the time, "like the fourth occupant" in *Anderson*, were victims of the shooting. (*Id*. at p. 1631.) Accordingly, the multiple-victim exception applied, and the defendant's consecutive sentence for shooting at an inhabited dwelling was proper. (*Ibid.*) Similarly here, the consecutive three-year sentence imposed for shooting at an inhabited dwelling did not violate section 654.[5]

2. *Imposition of the Firearm-Use Enhancement Did Not Violate Multiple Conviction or Double Jeopardy Prohibitions*

Spivey contends he was subjected to double jeopardy and impermissible multiple punishment when he was sentenced for both murder and intentionally discharging a firearm causing death because the necessary findings for the firearm-use enhancement in section 12022.53, subdivisions (d) and (e), duplicate or are included within the crime of murder. As he acknowledges, this claim has been rejected by the California Supreme Court. (*People v. Izaguirre* (2007) 42 Cal.4th 126, 130-131; *People v. Sloan* (2007) 42

5 Whether or not Spivey knew King was in the motel room and intended to kill him, is of no consequence. "[W]here the crime of shooting at an inhabited residence is involved, a defendant need not be aware of the identity or number of people in the house to be punished separately for each victim." (*People v. Felix, supra*, 172 Cal.App.4th at p. 1631.)

Cal.4th 110, 115-123.) We decline Spivey's invitation to register our disagreement with those decisions, which are binding on us. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Spivey additionally contends the murder conviction and the true finding on the firearm-use enhancement violate constitutional double jeopardy principles that he maintains should be applied when multiple punishment arises from a single prosecution. He concedes United States Supreme Court precedent requires a contrary result. (*Hudson v. United States* (1997) 522 U.S. 93, 99 [118 S.Ct. 488, 493, 139 L.Ed.2d 450]; *Missouri v. Hunter* (1983) 459 U.S. 359, 368 [103 S.Ct. 673, 74 L.Ed.2d 535].) However, Spivey argues the more recent decisions in *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101 [123 S.Ct. 732, 154 L.Ed.2d 588] and *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] compel a reassessment of those cases.

We are bound by decisions of the United States Supreme Court no less than those of the California Supreme Court (see *Auto Equity Sales, Inc. v. Superior Court, supra,* 57 Cal.2d at p. 455) and therefore reject Spivey's contention.

3. *The Gang Enhancement for Shooting at an Inhabited Dwelling Must Be Modified*

Based on the jury's finding that Spivey had shot at an inhabited dwelling for the benefit of a criminal street gang, the trial court enhanced the low term of three years imposed for that offense by five years pursuant to section 186.22, subdivision (b)(1)(B). As the People observe, however, when a violation of section 246 is committed for the benefit of a criminal street gang, section 186.22, subdivision (b)(4)(B) applies; and the defendant is subject to an alternate penalty of 15 years to life, rather than the term normally prescribed for the underlying conviction and the gang enhancement for a serious felony. (See *People v. Jones* (2009) 47 Cal.4th 566, 571-572.) Accordingly, the judgment must be modified to replace the sentence imposed on count three with an indeterminate term of life in prison with a minimum parole eligibility of 15 years.

DISPOSITION

The judgment is modified by replacing the term imposed on count three (a consecutive determinate term of three years plus a five year enhancement) with a consecutive indeterminate term of life in prison with a minimum parole eligibility of 15 years. As modified the judgment is affirmed. The superior court is directed to prepare a corrected abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.